BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JULIE K. BEACHUM	)	
Claimant	)	
VS.	)	
	)	
ACCESSORY CITY	)	
Respondent	)	Docket No. 1,049,720
AND	)	
	)	
FARMINGTON CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 25, 2013, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on November 13, 2013.

APPEARANCES

John L. Carmichael of Wichita, Kansas, appeared for claimant. Ali N. Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

ALJ Clark found claimant was injured out of and in the course of her employment each and every working day through her last date of employment, February 16, 2010. The ALJ adopted the functional impairment opinion of Dr. Paul S. Stein and found claimant sustained a 4% functional impairment to the right upper extremity at the level of the shoulder. The ALJ did not award claimant compensation for her alleged work-related cervical injury.

Claimant requests the Board modify the Award. Claimant contends she has a 14% whole body functional impairment and a work disability. Claimant asserts her right shoulder was immobilized after her July 12, 2010, right rotator cuff surgery. The immobilization caused muscles attached to claimant's neck to elevate claimant's right shoulder not normally used to elevate the shoulder. In turn, those muscles became injured, resulting in claimant sustaining a permanent whole body functional impairment. If the Board finds claimant did not sustain a whole body functional impairment, claimant asserts she sustained an 8% right upper extremity functional impairment.

Respondent requests the Board affirm the ALJ's Award. Respondent maintains the greater weight of the medical evidence establishes that claimant's impairment as a result of her workplace accident is limited to her right upper extremity. Specifically, respondent alleges: (1) claimant did not sustain a cervical injury; (2) if claimant sustained a cervical injury, it did not arise out of and in the course of her employment; and (3) said cervical injury did not result in a permanent impairment.

The issues before the Board on this appeal are:

1. What is claimant's right upper extremity functional impairment?

2. Did claimant sustain a permanent functional impairment to the body as a whole for an injury to her cervical spine arising out of and in the course of her employment with respondent?

3. If so, what is claimant's work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant's Application for Hearing alleged a right shoulder injury from repetitive use each and every working day through February 16, 2010. Claimant testified five times in this matter. At her March 24, 2010, deposition, claimant testified she worked for respondent from January 2007 through February 16, 2010. Claimant started out as a supervisor at respondent's 5,000-square-foot retail store, then was an assistant manager for approximately two and one-half years. In January 2010, claimant became the manager. As an assistant manager, claimant performed a variety of job tasks, including checking or receiving merchandise. That job task required claimant to remove boxes of merchandise from pallets, open the boxes, check in and sort the merchandise and place the merchandise into bins. Claimant would key each individual merchandise into the store's computer. The boxes would often be stacked on the pallets six feet or higher and would weigh from 5 to 50 pounds. Respondent received one shipment a week and claimant

would spend up to two days a week removing the boxes from pallets and checking in the merchandise.

At her March 24, 2010, deposition, claimant testified she sustained right shoulder and neck injuries as the result of her repetitive work activities:

> Q. (Ms. Penner) Anything besides the right shoulder?
>
> A. (Claimant) Well, it's this whole area of the -- my upper arm I guess. (Indicating)
>
> Q. No, that's fine. Let's go ahead and try to identify the pain. Do you have pain that extends below your right elbow?
>
> A. Not pain. Sometimes there is tingling and numbness in my arm, but there's no pain below my elbow. (Indicating)[1]
>
> . . .
>
> Q. Any problems with your neck?
>
> A. Occasionally it gets tight right in this area here. (Indicating) So I'm not sure if that's considered the shoulder or where the neck starts and the shoulder ends.
>
> Q. Okay.
>
> A. So like right here it's still tender. I'm not sure if that's considered neck or shoulder right here. (Indicating)
>
> Q. Okay. And by "right here," you're indicating with your fingers probably about midway between --
>
> A. My neck.
>
> Q. -- the bottom of your neck and your shoulder.
>
> A. Yes.[2]

Claimant next testified at a March 25, 2010, preliminary hearing, but was not asked which of her body parts were injured. Claimant's counsel alleged claimant sustained a right shoulder injury, but did not mention a neck injury.

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[1] Claimant Depo. (March 24, 2010) at 30.

[2] *Id.* at 34.

Claimant testified at a June 7, 2011, preliminary hearing that her pain had not gotten better and was worsening. Claimant was not asked, nor did she testify, about sustaining a neck injury.

At an August 31, 2012, deposition, claimant testified she initially was injured in November 2009 when pulling a box that was heavier than anticipated off a pallet. Claimant twisted to get her head out of the way and took the impact of the box on her body and slid the box to the floor. Claimant continued to work, but there was tension and tightness in her neck area. The more she used her neck, the more the pain worsened.

Claimant testified that after the March 25, 2010, preliminary hearing, she was assigned to see Dr. Sandra Barrett. Dr. Barrett saw claimant for the first time on April 21, 2010, for her right shoulder injury. As part of the intake process, claimant was asked to place Xs on a pain diagram to indicate pain. Claimant placed no Xs in the area of the neck or the base of the neck on the pain diagram. Claimant testified she did not do so because her most significant pain was in the right shoulder and her focus was on the shoulder pain. Claimant testified she received physical therapy for both her shoulder and neck.

The physical therapy worsened claimant's right shoulder symptoms, so Dr. Barrett ordered an MRI. The MRI revealed a right rotator cuff tear. Claimant was sent to see Dr. Pat Do, who performed arthroscopic right rotator cuff surgery on July 12, 2010. Physical therapy after claimant's surgery prescribed by Dr. Do caused strain and tension on the neck and claimant noticed significant pain up to the base of her skull. Claimant testified that following surgery, Dr. Do prescribed pain medications and she also received injections into the base of her neck and her shoulder area. Claimant testified she had a mass of knotted muscles at the base of her neck and modalities such as ultrasound and a TENS unit were used in an effort to relax the knotted muscles.

Approximately one year after her shoulder surgery, claimant began treating with one of Dr. Do's colleagues, Dr. David E. Harris. The doctor prescribed physical therapy and provided trigger point and epidural injections into claimant's neck. When she testified on August 31, 2012, claimant was taking Celebrex, Robaxin and Tizanidine prescribed by Dr. Harris and she was still experiencing limited mobility in her neck, limited overhead use of her right shoulder and her neck pain had worsened.

Following claimant's right shoulder surgery by Dr. Do, she underwent physical therapy at Mid-America Orthopedics from July 14, 2010, through March 10, 2012, where Drs. Do and Harris are employed. Zach Stuke,[3] a physical therapist at Mid-America, provided claimant physical therapy from June 30, 2011, through March 7, 2012. Mr. Stuke testified that because of claimant's right shoulder injury, her body was using the levator scapulae muscle to elevate her right shoulder. He explained that the levator scapulae

[3] Mr. Stuke testified he has a doctorate of physical therapy degree.

muscle attaches from the top of the scapula to vertebrae in the cervical spine. It is not a usual function of the levator scapulae muscle to elevate the shoulder. Mr. Stuke indicated elevating the shoulder with the levator scapulae muscle is a condition that has a delayed onset and does not occur at the time of the original injury.

Mr. Stuke testified claimant also had deltoid muscle substitution to elevate claimant's shoulder. The deltoid substitution caused claimant to have anterior glide, which is excessive or abnormal movement of the humeral head during shoulder movement. Mr. Stuke indicated that anterior glide typically has a delayed onset because there was a period of immobilization to allow for healing of the shoulder and because of issues with subsequent strengthening. Mr. Stuke testified as follows regarding why the onset of claimant's neck pain was delayed:

> Q. (Mr. Carmichael) In your judgment, as a physical therapist, would there be an explanation as to why this lady had an apparent delay in the onset of the symptoms involving her neck until sometime, perhaps even in the spring of 2011, which would have been over a year following the initial injury?
>
> A. (Mr. Stuke) In my opinion, I think why her pain was delayed from there, was due to the fact of her compensating using the levator and overcompensating with the other muscles of the shoulder blade that were causing or pulling a rotational affect on the neck causing it to move abnormally.
>
> Q. And so that would account for a worsening of symptoms in the neck even subsequent to Dr. Do's surgery?
>
> A. Absolutely, yes.[4]

Mr. Stuke testified claimant's levator scapulae muscle and upper trapezius muscle were applying more force than designed on claimant's neck vertebrae. He also indicated that during the time he provided claimant with physical therapy, she made complaints of right shoulder and neck pain. Mr. Stuke acknowledged he was unable to obtain a full resolution of claimant's right shoulder and neck symptoms. He also indicated that although claimant had neck injections, her symptoms persisted. On February 22, 2012, Mr. Stuke measured claimant's cervical range of motion and determined her: (1) cervical flexion was 90% of normal, (2) cervical extension was 100% of normal, (3) side bending to the right was 90% of normal, (4) side bending to the left was 75% of normal, (5) right cervical rotation was 90% of normal, and (6) left cervical rotation was 80% of normal. This varied from earlier range of motion measurements Mr. Stuke made on August 18 and October 7, 2011. Mr. Stuke explained that claimant's pain and what she had been doing could cause the range of motion to vary.

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[4] Stuke Depo. at 25.

On cross-examination, Mr. Stuke confirmed an MRI showed claimant had disc protrusions at C5-6 and C6-7 and mild foraminal stenosis that would cause claimant neck pain. He testified the protrusions and stenosis would be directly caused because of abnormal muscle movement related to claimant's right shoulder injury.

At the request of claimant's attorney, claimant was evaluated by Dr. George G. Fluter on March 10, 2011. Dr. Fluter's review of claimant's medical records indicated she was first treated by Dr. John Kready on January 8, 2010, for right shoulder pain. Claimant was treated by Dr. Barrett from April 21, 2010, through June 7, 2010. Dr. Barrett eventually ordered an MRI of claimant's right shoulder that revealed a rotator cuff tear. Dr. Fluter indicated that claimant began physical therapy two days after she underwent arthroscopic right shoulder surgery on July 12, 2010, and that physical therapy lasted six to seven months.

Dr. Fluter diagnosed claimant with status post work-related injury, right shoulder/upper extremity pain, right shoulder internal derangement, status post right shoulder athroscopy, neck/upper back and right upper shoulder pain, cervicothoracic strain/sprain and myofascial pain affecting the neck and right shoulder girdle. Using the *Guides*,[5] on March 10, 2011, Dr. Fluter opined claimant had an 8% functional impairment to the right upper extremity at the level of the shoulder. Dr. Fluter also assigned claimant a 5% whole body permanent partial impairment in accordance with DRE Cervicothoracic Spine Impairment Category II.

Dr. Harris began treating claimant on August 9, 2011. Claimant indicated on a pain diagram she completed on August 8, 2011, for Dr. Harris that the back of her head and neck ached. The doctor testified claimant's main complaint was cervical pain that began after her right shoulder injury. Dr. Harris explained the delayed onset of claimant's neck condition was because once a person's shoulder injury is taken care of, the person then tends to notice problems in other parts of the body. Dr. Harris also testified that a blow to the shoulder girdle could cause a neck injury.

From radiological studies, Dr. Harris determined claimant had degenerative changes between C4 and C7. He also suspected claimant had myofascial pain. Because claimant did not respond well to epidural injections, Dr. Harris suspected muscular rather than disc involvement. The doctor testified that within a reasonable medical probability the cause of claimant's cervical pain was multifactorial: myofascial, discogenic and degenerative. However, he could not say which was the predominant cause. Claimant's right shoulder injury caused the myofascial pain syndrome and muscle imbalances. Ultimately, Dr. Harris opined claimant's myofascial pain syndrome and muscle imbalances caused the delayed cervical symptoms.

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Harris sent a letter on March 15, 2012, to a claims representative for Travelers Insurance indicating that using the *Guides*, claimant had a 4% functional impairment to the right upper extremity. That rating was based on Tables 11 and 13 of the *Guides* and was because of sensory deficits of the C6 dermatome. It was not Dr. Harris' intention that his impairment ratings encompass the pathology for which Dr. Do rated claimant. On October 2, 2012, after claimant's attorney and Dr. Harris visited, Dr. Harris converted claimant's functional impairment from 4% to the upper extremity to 2% to the body as a whole. Dr. Harris testified the pathology for which he was providing an impairment rating included structures of the neck and the shoulder girdle. The doctor indicated claimant's functional impairment was to the body as a whole as it involved the axial spine. He indicated he used Figure 46 and Table 13 of the *Guides* in arriving at his functional impairment opinion that claimant had a whole body functional impairment. Dr. Harris also indicated that when he last saw claimant on March 8, 2012, she had restrictions of cervical motion of 30 degrees flexion, 30 degrees extension and 25 degrees lateral flexion. If the range of motion model were used, claimant would have a permanent functional impairment.

By order of the ALJ, claimant underwent an independent medical evaluation by Dr. Paul S. Stein on July 31, 2012. The doctor opined claimant sustained a 4% functional impairment to the right upper extremity at the level of the shoulder.

Dr. Stein indicated claimant reported having pain on the right side of her neck after taking boxes from a pallet and one box was heavier than she expected. Dr. Stein's report indicated that claimant stated she told Drs. Barrett and Do of having neck pain. With regard to claimant's alleged neck injury, Dr. Stein did not assign claimant a functional impairment and indicated:

> Ms. Beachum reports that she had neck pain, particularly on the right, ever since her shoulder problems started. The primary care records of Dr. Rees did not reflect neck pain. The Independent Medical Evaluation done by Dr. Brown on 3/10/10 makes no mention of neck symptomatology. The physical medicine records of Dr. Barrett makes *[sic]* no mention of neck symptomatology and the pain diagram by the patient herself, as well as her handwritten statement regarding symptomatology, on 4/21/10 does not reflect neck symptomatology. Ms. Beachum was under the care of Dr. Do from 6/22/10 until the initial release on 1/27/11 without mention of neck pain. The first notation I found regarding neck pain was the IME by Dr. Fluter on 3/10/11 with the patient subsequently returning to Dr. Do in June of 2011 indicating that pain in the neck was present "all along". Her work activity at Accessory City stopped on or about 2/14/10 prior to the IME by Dr. Brown and the care by Dr. Barrett and prior to the initial care by Dr. Do. I cannot document within a reasonable degree of medical probability and certainty that this patient has sustained an injury to the neck during that employment. I have no basis to provide

> any functional impairment or medical restrictions to the neck in relation to the work activity at Accessory City.[6]

Claimant was evaluated a second time by Dr. Fluter on April 18, 2012. Dr. Fluter took a history, physically examined claimant and reviewed additional medical records, including those of Dr. Harris. It was Dr. Fluter's opinion that claimant sustained an initial right shoulder injury when she was taking down the box in November 2009, and then aggravated the injury through her repetitive work activities thereafter. The doctor testified that when he initially saw claimant in March 2011, he diagnosed tenderness to palpation in the muscles of the right side of her neck/upper back, upper shoulder and scapula stabilizers. When he saw claimant on April 18, 2012, her condition had worsened.

Dr. Fluter testified that because claimant's complaints of neck symptoms were delayed, that does not mean they are unrelated to her initial injury. The doctor went on to testify that the shoulder girdle is suspended on the body by muscles, some of which have their origin at the back of the head, as well as the vertebral bodies of the neck and upper and middle back, attaching to the shoulder blade and suspending the shoulder girdle on the body. Those muscles can be affected by any injury to the shoulder joint or shoulder mechanism and as the result of injury or dysfunction of parts of the shoulder mechanism. A person can have pain and strain/sprain of those muscles. Dr. Fluter testified claimant had indicated she always had some degree of neck symptoms, but the symptoms worsened with time.

Like Mr. Stuke, Dr. Fluter testified that claimant, after her right shoulder surgery, was using muscles in her neck, upper back and shoulder girdle to substitute for another muscle group. That applies unusual stresses on the cervical spine. The doctor attributed the dysfunction of the scapula stabilizers primarily to claimant's immobilization following surgery, but also to issues with motion mechanics. He indicated claimant has a degree of nerve impairment related to muscular dysfunction in the neck, upper back and shoulder girdle. The doctor testified claimant has scapula dyskinesis, which is related to her initial injury and its subsequent conditions, including surgery and post-operative immobilization.

Using Figures 38, 41 and 44 of the *Guides*, Dr. Fluter opined claimant had a 10% functional impairment to the right upper extremity at the level of the shoulder. He also assigned 4% to the right upper extremity due to sensory deficit in the C6 distribution. Using the Combined Values Chart, Dr. Fluter combined the foregoing functional impairments for a 14% functional impairment to the right upper extremity. The doctor explained that the sensory deficit was not present when he saw claimant in March 2011.

Dr. Fluter's opinion that claimant sustained a 5% whole body permanent partial impairment in accordance with DRE Cervicothoracic Spine Impairment Category II as a

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[6] Stein IME Report at 6-7.

result of her myofascial pain remained unchanged. Dr. Fluter indicated he assigned the 5% body as a whole impairment for myofascial pain because of physical findings, including tenderness, taut muscle bands, dysesthesia and non-verifiable radicular complaints without objective evidence of radiculopathy. When asked why he assigned a separate 5% to the cervical spine, Dr. Fluter testified, "Well, that goes back to what we have talked about previously. I think that there is a component related to the neck and upper back shoulder girdle, which again, those muscles begin, they originate, they have their origin on basically the neck and upper back."[7] Using the Combined Values Chart, Dr. Fluter determined claimant had a 13% whole body functional impairment.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[8] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[9]

The ALJ, relying on the opinion of Dr. Stein, found claimant had a 4% functional impairment to the right upper extremity at the level of the shoulder. The Board majority agrees with ALJ Clark's assessment that claimant's functional impairment is limited to the right upper extremity at the level of the shoulder. However, the Board majority finds claimant has a 7% functional impairment to the right upper extremity at the level of the shoulder. The Board majority finds credible the right shoulder functional impairment opinions of Drs. Stein (4%) and Fluter (10%) and gives them equal weight. The Board majority also finds that Dr. Fluter's 4% functional impairment to the right upper extremity due to sensory deficit in the C6 distribution is not credible.

The Board majority concludes claimant failed to prove by a preponderance of the evidence that as a result of her work-related injury she sustained a whole body permanent functional impairment. Claimant testified she injured her right shoulder and neck as a result of the November 2009 accident and repetitive work activities thereafter. She testified she had neck symptoms before her July 2010 right shoulder surgery. Yet, Mr. Stuke and Drs. Harris and Fluter indicated claimant's neck injury was likely caused by her right shoulder surgery. Their explanation is that claimant's right shoulder surgery caused her body to use muscles connected to the cervical spine to elevate claimant's right shoulder, muscles that the body does not normally use to elevate the shoulder. In turn, claimant developed myofascial pain that resulted in a whole body permanent functional impairment.

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[7] Fluter Depo. at 35.

[8] K.S.A. 2009 Supp. 44-501(a).

[9] K.S.A. 2009 Supp. 44-508(g).

Claimant's testimony and the theory of how she sustained her neck injury cannot be reconciled and are not credible. Claimant testified her neck began hurting in November 2009. She told Drs. Fluter and Stein her neck symptoms began at the time of her injury. However, claimant then asserts her delayed neck symptoms and resulting impairment began following her right shoulder surgery.

Dr. Stein, the court-appointed independent medical examiner, reviewed claimant's medical records and indicated the first mention of neck pain in claimant's medical records was March 10, 2011, when she saw Dr. Fluter. That was nearly eight months after claimant's right shoulder surgery. Dr. Stein was emphatic claimant's neck symptoms were not the result of her work activities at respondent.

CONCLUSIONS

1. Claimant sustained a 7% functional impairment to the right upper extremity at the level of the shoulder.

2. Claimant failed to prove she sustained a permanent functional impairment to the body as a whole for an injury to her cervical spine arising out of and in the course of her employment with respondent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[10] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies[11] the July 25, 2013, Award entered by ALJ Clark as follows:

Based upon an average weekly wage of $692.31, claimant is entitled to 37 weeks of temporary total disability compensation at the rate of $461.56 per week, or $17,077.72, followed by 13.16 weeks of permanent partial disability compensation at the rate of $461.56 per week, or $6,074.13, for a 7% functional impairment to the right upper extremity at the level of the shoulder, making a total award of $23,151.85. The entire $23,151.85 is due and owing and is ordered paid in one lump sum, less amounts previously paid.

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[10] K.S.A. 2012 Supp. 44-555c(k).

[11] The Board modifies the Award because it found claimant sustained a 7% functional impairment to the right upper extremity at the level of the shoulder and because ALJ Clark erroneously calculated claimant's permanent partial disability benefits as though claimant sustained a whole body functional impairment.

Should claimant's counsel desire attorney fees be approved in this matter, counsel may submit that matter to the ALJ.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member concurs with the majority that claimant sustained a 7% functional impairment to the right upper extremity at the level of the shoulder. However, this Board Member dissents from the majority's finding that claimant failed to prove she sustained a neck injury arising out of and in the course of her employment with respondent that resulted in a whole body permanent functional impairment.

A close review of Dr. Stein's report reveals that he did not state claimant did not have a neck injury. Nor did Dr. Stein opine claimant had no whole body functional impairment or medical restrictions for her neck. Instead, Dr. Stein stated:

> I cannot document within a reasonable degree of medical probability and certainty that this patient has sustained an injury to the neck during that employment. I have no basis to provide any functional impairment or medical restrictions to the neck in relation to the work activity at Accessory City.[12]

[12] Stein IME Report at 6-7.

Dr. Stein never commented on whether claimant's right shoulder surgery and resulting overuse of certain neck muscles caused claimant to have a neck injury and a permanent whole body impairment. The doctor simply stated claimant's neck injury was not caused by her work activity.

Conversely, there is ample medical evidence in the record that claimant sustained a neck injury following her right shoulder surgery. Drs. Harris and Fluter and Mr. Stuke opined that as a result of claimant's right shoulder injury, she used muscles connected to her cervical spine not normally used to elevate the shoulder. Those opinions are uncontroverted. Dr. Harris prescribed medications, physical therapy and gave claimant neck injections. Dr. Do prescribed a TENS unit, trigger point injections, muscle relaxants and anti-inflammatories. Dr. Fluter assigned claimant a whole body functional impairment for myofascial pain. Dr. Harris used the *Guides* to provide claimant a 2% whole body functional impairment because the pathology for the impairment rating included structures of the neck and the shoulder girdle. This Board Member would find claimant's neck injury and whole body functional impairment were the natural and probable result of her work-related activities. Equal weight should be given to the opinions of Drs. Harris and Fluter. This Board Member would find claimant has a 3.5% whole body functional impairment for her cervical injury and remand this matter to the ALJ to determine claimant's work disability.

BOARD MEMBER

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Honorable John D. Clark, Administrative Law Judge